8-27-2014

State v. Denton Appellant's Reply Brief Dckt. 41512

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. SHANE ROY DENTON, Defendant-Appellant.	NO. 41512 TWIN FALLS COUNTY NO. CR 2012-13926 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Shane Denton appeals, contending that, during the closing arguments in his trial for attempted strangulation, there was prosecutorial misconduct – erroneous statements of law, vouching for a witness, and disparaging defense counsel – which rises to the level of fundamental error. The State responds, contending that all the challenged statements were comments on the evidence or drew inferences from the evidence, and as such, there is no error clear from the face of the record. It also contends that the jury was sufficiently instructed, so that any error was not prejudicial.

The State is mistaken. The State's arguments do not address the actual comments made by the prosecutor in closing, but rather, the arguments the State believes the prosecutor was trying to make. The actual arguments do show clear error. Additionally, despite the fact that there is a presumption that the jury follows the district court's instructions, there is still a reasonable possibility that the prosecutor's erroneous statements contributed to the verdict in this case.

Since Mr. Denton has demonstrated fundamental error through prosecutorial misconduct in this case, this Court should vacate his conviction and remand this case for a new trial.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Denton's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the prosecutor committed misconduct rising to the level of fundamental error by misstating the law, vouching for a witness, and disparaging defense counsel.

ARGUMENT

The Prosecutor Committed Misconduct Rising To The Level Of Fundamental Error By Misstating The Law, Vouching For A Witness, And Disparaging Defense Counsel

The State does not challenge Mr. Denton's assertion that, if there was prosecutorial misconduct, it would infringe on his constitutional rights, and as such, does not challenge his argument on the first prong of the fundamental error analysis. (*See generally* Resp. Br.; *see* App. Br., pp.5-6.) Rather, it focuses its arguments on the second and third prongs of the fundamental error analysis: whether there is error clear on the face of the record, and whether that error prejudiced the defendant. *See State v. Perry*, 150 Idaho 209, 227 (2010). However, the State's arguments on those points are misplaced. Considering the actual statements made by the prosecutor, rather than the arguments the State believes the prosecutor was trying (but failing) to make, this record demonstrates clear and prejudicial error, and thus, fundamental error.

A. The Prosecutorial Misconduct Is Clear From The Face Of The Record, Given The Statements Actually Made By The Prosecutor

1. The Prosecutor Committed Clear Misconduct By Misrepresenting The Law To The Jury

Mr. Denton argued that the prosecutor committed misconduct by arguing that "You can't use double hearsay to prove somebody is inconsistent. You have to ask the person who made the comment and allow them to respond." (Tr., Vol.2, p.211, Ls.10-12.) This statement refers to the defense's attack on H.D.'s version of events by introducing contradictory statements in Officer Gates' report of her interview of H.D. through Officer Gates' testimony.

I.R.E. 806 specifically states that defense counsel did not have to confront H.D. with the inconsistency, and the district court properly overruled the State's hearsay objection in regard to introducing Officer Gates' testimony and Officer Gates' report. (*See* App. Br, p.8.) For the prosecutor to have claimed otherwise was a misstatement of the law, which constitutes misconduct.

However, the State contends that this is not misconduct because the prosecutor was simply asking the jury to draw inferences about H.D.'s credibility from the evidence presented, or inversely, draw an inference from the evidence not presented. (Resp. Br., pp.7-8.) The State's argument is misplaced because it does not address the actual statements made by the prosecutor. Rather, the State's contention is related to the arguments the State believes the prosecutor was trying to (but ultimately failed to) make. The State's argument is inappropriate, since review of potential misconduct on appeal is focused on the statements the prosecutor actually made to the jury. *See, e.g., State v. Erickson*, 148 Idaho 679, 684 (Ct. App. 2010) (holding that, in considering a violation of a pretrial ruling, "[w]hatever the prosecutor's intent, it was misconduct for him to [introduce] this evidence").

Specifically, the State's argument on appeal is that the prosecutor was asking the jury to not give weight to H.D.'s comments to Officer Gates because she was not given a chance to explain the inconsistency, or because the inconsistency was caused by Officer Gates' incomplete or inaccurate report of H.D.'s comments. (Resp. Br., p.7.) However, the prosecutor actually told the jury that "You ***can't*** use double hearsay to prove somebody is inconsistent. You ***have to*** ask the person who made the comment and allow them to respond." (Tr., Vol.2, p.211, Ls.10-12 (emphasis added).) "Cannot"

and "have to" are mandatory in nature, telling the jury that it has no choice but to reach the same conclusion as the prosecutor, whereas asking them to reach a conclusion is permissive, and allows the jurors to agree or disagree with the prosecutor based on their own evaluation of the evidence. *Compare Rife v. Long*, 127 Idaho 841, 848 (1995) (holding that the term "must" establishes a mandatory duty to act in a certain manner, whereas "may" would authorize, but not require, the proscribed action). By arguing under the permissive language, the State changes the entire nature of the prosecutor's actual statements, which does not comport with the standard of review.

The prosecutor's actual argument told the jurors that they were required, as a matter of law, to disregard the inconsistency of H.D.'s version of events demonstrated by Officer Gates' report because the law did not allow them to properly consider Officer Gates' testimony in that regard, absent giving H.D. an opportunity to explain. As established in the Appellant's Brief, this misstates the law, and misstatements of the law constitute prosecutorial misconduct. (App. Br., pp.6-8.) Therefore, given the actual statements made by the prosecutor, the misconduct in this regard is clear from the face of the record.

2. The Prosecutor Committed Clear Misconduct By Vouching For The State's Witnesses

Mr. Denton contended that the prosecutor committed misconduct by vouching for the credibility of Dr. Ellsworth when the prosecutor argued that, "[w]hat she [Dr. Ellsworth] does is she takes the medical history. She takes down what she's told by the victim. Why isn't that hearsay under Idaho law? Because it's believed that any statements you make to a doctor are statements that you make to tell them about your

injuries." (Tr. Vol.2, p.182, Ls.4-8.) The State contends that those statements were appropriate because they were based on a correct statement of the law (that Dr. Ellsworth's report was admissible pursuant to I.R.E. 803(4)). (Resp. Br., p.9.) The State's argument is wrong on two levels.

First, the State's contention misconstrues the actual argument the prosecutor made. The prosecutor argued that Dr. Ellsworth's testimony was *not hearsay.* That is not a correct statement of the law, as it is not consistent with rules of evidence which define hearsay. As Dr. Ellsworth's testimony recounted an out-of-court statement offered for the truth of the matter asserted, it was, in fact, hearsay. I.R.E. 801. There is simply *an exception* to hearsay rules that allow such testimony to be admissible, even though it constitutes hearsay. I.R.E. 803(4). Thus, the State's contention – that the prosecutor did not commit misconduct because she made an argument premised on a correct statement of the law – is erroneous given the actual argument made by the prosecutor, and so, should be rejected.

The second problem with the State's contention in this regard is that the prosecutor's statements were not comments on the evidence. For example, the prosecutor might have discussed which statements in Dr. Ellsworth's report suggest that it is an accurate account of the events in question, or she might have discussed the consistency between those reports and H.D.'s testimony at trial. Instead, the prosecutor went beyond the permissible scope of closing arguments, and declared the witness to be credible because her statement was properly admitted under the law. By arguing that Dr. Ellsworth's statements are not hearsay, the prosecutor was telling the jury that, because Dr. Ellsworth's statements are admissible, the jury should find Dr. Ellsworth's

testimony credible. That constitutes vouching because, in essence, the prosecutor put the prestige of Idaho's Rules of Evidence behind the State's witness.

The fact that the prosecutor was vouching for Dr. Ellsworth is particularly obvious in this case, where the prosecutor also argued that the contradicting witness's testimony was not properly admitted as a matter of law under those same hearsay rules. The result was an argument by the prosecutor that Dr. Ellsworth was more credible than Officer Gates because Dr. Ellsworth's testimony was legally admissible, whereas Officer Gates' testimony was not. That is not a proper comment on the evidence or an appropriate articulation of an inference to be drawn therefrom. It is a comment directly on the credibility of the witnesses themselves, and therefore, constitutes improper vouching. (App. Br., pp.9-10.) That constitutes misconduct, and it is clear from the actual statements made by the prosecutor on the face of the record.

3. The Prosecutor Committed Clear Misconduct By Disparaging Defense Counsel

Mr. Denton contended that the prosecutor committed misconduct by arguing that:

> [Defense counsel] never challenged [H.D.] on any of those [inconsistencies]. He didn't pick [her statement] up and say, didn't you say here in your statement da-da-da-da-da-da. He never asked her because he didn't want her to say, that's not what I said. What does he do? He waits and gets Officer Gates on the stand and says [H.D.] told you this and that's inconsistent isn't it? . . . So if you can't point out discrepancies in somebody's testimony to that person, let's use somebody else.
>
> . . .
>
> You know, if you can't break your witness, if you can't make them say something inconsistent, what do you do? You go after law enforcement. So, sure enough, let's go after Officer Gates.

(Tr., Vol.2, p.210, L.20 - p.211, L.2; Tr., Vol.2, p.212, Ls.19-21.) This constituted an inappropriate comment disparaging defense counsel and how he decided to argue the case, rather than commenting on the evidence itself. The State responds that, because "the prosecutor did not malign *the role* of defense counsel," that all the prosecutor did was "point[] out what defense counsel did, what evidence defense counsel elicited, and what evidence counsel did not elicit from [H.D.]," there was no misconduct. (Resp. Br., p.11 (emphasis added).) The State's argument is overly narrow in assessing whether the prosecutor has committed misconduct.

The touchstone of the analysis for misconduct is whether the prosecutor is making statements which might inflame the jurors' passions or prejudices in order to secure a guilty verdict. *See, e.g., State v. Ellington*, 151 Idaho 53, 64 (2011) (holding that the challenged statements constituted misconduct because they constituted "attempt[s] by the prosecutor to influence the jury's passions and prejudices"); *State v. Higgins*, 122 Idaho 590, 600 (1992) (recognizing that there is misconduct "where the record shows that the prosecuting attorney has been guilty of misconduct calculated to inflame the minds of the jurors and arouse passion or prejudice against the accused by statements in his argument of the facts not proved by the evidence") (internal quotation marks omitted). A prosecutor commits misconduct (inflames the prejudices of the jury) by attacking the particular defense attorney in a given case, or by maligning the role of defense counsel generally, since either argument might cause the jury to convict based on its dislike of defense counsel, rather than the evidence presented at trial. *See State v. Page*, 135 Idaho 214, 223 (2000) (recognizing that a prosecutor may commit misconduct by personally attacking the defense attorney in the

given case); *State v. Baruth*, 107 Idaho 651, 657 (Ct. App. 1984) (recognizing that a prosecutor may commit misconduct by disparaging the role of defense counsel).

By limiting the analysis to only whether the prosecutor maligned *the role* of defense counsel (Resp. Br., p.11), the State improperly narrows the question on appeal. Mr. Denton's case is an example of a prosecutor trying to inflame the prejudices of the jurors by attacking the defense attorney in this case: "[*defense counsel*] never challenged [H.D.] on any of those [inconsistencies]," "*he* didn't pick [her statement] up and say . . . ," "[*h*]*e* never asked her . . . ." (Tr., Vol.2, p.210, L.20 - p.211, L.2 (emphasis added).) More than that, the prosecutor argued that defense counsel made these decisions because he did not want the jury to hear H.D.'s explanation of the inconsistency[1]: "He never asked her *because he didn't want her to say, that's not what I said* . . . . if you can't break your witness, *if you can't make them say something inconsistent*, what do you do? You go after law enforcement." (Tr., Vol.2, p.210, Ls.23-24; Tr., Vol.2, p.212, Ls.19-21 (emphasis added).) These statements not only disparage defense counsel's strategy in this case ("[he] never challenged [H.D.]" or "he never asked her"), but they also, contrary to the State's assertion on appeal, disparage the role of defense counsel in this case ("if you can't make them say something inconsistent, what do you do? You go after law enforcement"). These statements are nothing more than an attempt to inflame the passions of the jury against defense

[1] The prosecutor decided to attack defense counsel's decision to not confront H.D. about the inconsistencies in her closing arguments even though the proper method under the law to address this issue would have been for *the prosecutor* to recall H.D. and introduce H.D.'s explanation of that contradiction into evidence. *See* D. Craig Lewis, Idaho Trial Handbook §18.3, at pp.205-06. Thus, it was actually the prosecutor's error that kept H.D.'s explanation of the inconsistency from the jury, making her attack on defense counsel in that regard even more problematic.

counsel by portraying him as trying to mislead the jury about the facts ("because he didn't want her to say . . . .") and unjustly attacking the credibility of another witness ("if you can't make them say something inconsistent, what do you do? You go after law enforcement") rather than arguing about the facts as they had actually been presented into evidence. This also demonstrates that the State's contention – that the prosecutor's arguments were properly limited to comments on the actual evidence (*see* Resp. Br., pp.10-12) –presented is also erroneous.

Thus, considering the prosecutor's comments under the proper scope of evaluation, they constitute clear misconduct on the face of the record.

B. These Errors Prejudiced Mr. Denton

The State's only argument in regard to Mr. Denton's claim of prejudice is that the jury was instructed on its proper role, specifically, what statements it could and could not consider as evidence in its deliberations. (Resp. Br., pp.8-11.) Because the jury is presumed to follow those instructions, the State concludes that there was no prejudice in this case. (Resp. Br., pp.8-11.) However, the fact that there is a presumption that the jury will follow the instructions does not, *ipso facto*, mean that there is no prejudice in this case. The State's argument asserts that the presumption forces an irrefutable conclusion, rather than the proper perspective – that the presumption sets forth a conclusion that can be disproved by the facts in the record. To show prejudice (*i.e.*, to overcome that presumption), the defendant must show that "there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. Mr. Denton has met the burden set forth in *Perry*, demonstrating that the facts in this

case do show prejudice, and thus, has overcome the presumption that the jury's verdict was reached in accord with the instructions.

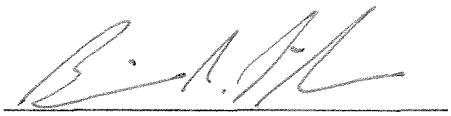
In this case, the defense's primary tactic was to show there was, at least, a reasonable doubt as to whether events unfolded as H.D. testified they had. (R., pp.222-25.) Each of the statements constituting misconduct was aimed at getting the jury to disregard the evidence presented in support of that theory: (1) the evidence supporting that theory was not legally available for consideration by the jury; (2) the witness contradicting the defense's theory was, as a matter of law, credible, because her statements were legally available for consideration by the jury; and (3) defense counsel was deliberately not presenting the full picture to the jury in regard to the evidence supporting that theory. Thus, while the jury had been instructed that it *could* consider all the evidence presented in the case, and that the statements of the lawyers were not, themselves, evidence, there is a reasonable possibility that the jury decided not to consider the evidence contradicting H.D.'s version of events based on any one of the prosecutor's erroneous statements. Thus, even starting with the presumption the State advocates, the facts of this case overcome that presumption and show that the prosecutorial misconduct prejudiced Mr. Denton.

Therefore, Mr. Denton has demonstrated that the prosecutorial misconduct rose to the level of fundamental error because they were so egregious or inflammatory that they deprived Mr. Denton of his constitutional rights to a fair trial and due process. Therefore, this Court should vacate the conviction and remand this case for a new trial.

CONCLUSION

Mr. Denton respectfully requests that this Court vacate the guilty verdict and the judgment of conviction and remand this case for a new trial.

DATED this 27th day of August, 2014.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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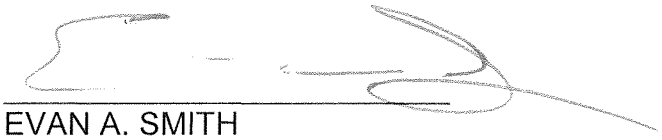

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